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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6413

BERTHE LETOURNEAU,

Appellant,

-against-

JOSEPH A. CALIFANO, as Secretary of Health, Education and Welfare of the United States, and JEROME KURTZ, as United States Commissioner of Internal Revenue,

Appellees.

ORIGINAL COPY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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PRELIMINARY STATEMENT

Pursuant to Rule 16(4) of the Rules of this Court, this brief is submitted in opposition to that part of the appellees' motion to dismiss or affirm the instant appeal that is based upon the alleged untimliness of the appeal.[1/]

1. Plaintiff, of course, opposes the motion in its entirety. However, with respect to the other arguments presented in the defendants' motion, she rests on her Jurisdictional Statement.

STATEMENT OF PERTINENT FACTS

On June 9, 1978, oral argument before the statutory Three-Judge Court was heard on plaintiff's motion for summary judgment and defendants' motion for judgment on the pleadings in this case. By opinion dated July 24, 1978 that court denied plaintiff's motion for summary judgment, granted defendants' motion for judgment on the pleadings and directed the parties to settle judgment on seven days notice. Notice of Settlement, containing the proposed judgment, was served by mail on plaintiff's counsel by defendants' counsel on September 6, 1978. Plaintiff's counsel responded thereto by letter dated September 13, 1978.

Plaintiff's attorney, Arthur Fried, overlooked the notice contained in the October 3, 1978 issue of the New York Law Journal indicating that an "order" had been signed in Letourneau v. Califano. No card from the clerk's office giving notice of entry of this judgment was received by Mr. Fried or by John Kirklin or Kalman Finkel, attorneys of record for the plaintiff herein, although Rule 77(d) of the Federal Rules of Civil Procedure requires the clerk to serve such notice. No other notification of the entry of judgment was received by plaintiff's counsel.

Between October 2, 1978 and November 2, 1978 Mr. Fried telephoned the chambers of District Judge Kevin T. Duffy, who convened the statutory Three-Judge Court in this case, on either one or two occasions to inquire whether a judgment had been entered. Mr. Fried was told by one of

the judge's law clerks that the judgment had not as yet been filed.

Sometime during October, 1978 Mr. Fried met Frederick Schaffer, the Assistant United States Attorney handling the case for the Government, in an elevator in the United States Courthouse for the Southern District of New York at Foley Square. Mr. Schaffer asked Mr. Fried if an appeal was planned and, when he was told that one was, he reminded Mr. Fried that a notice of appeal should be served on him. Mr. Schaffer made no mention of a judgment having been entered in the case.

On November 1, 1978 plaintiff's motion for leave to appeal in forma pauperis and for transcription of the record was filed. This motion was granted on November 2nd and entered on the docket on November 3, 1978.[2/]

On November 3, 1978 Mr. Fried again telephoned Judge Duffy's chambers to inquire about the status of the judgment and was told by one of Judge Duffy's law clerks that it had either been filed earlier that day, or would be filed by the end of the day.[3/] Sometime during the week of November 6, 1978 Mr. Fried visited the Public Reference Room of the Clerk's Office for the Southern District of New York. Upon requisitioning the docket sheet and the case file,

2. Plaintiff's counsel shortly received notice from the clerk of the entry of this order and notice also appeared in the November 6, 1978 issue of the New York Law Journal.

3. In retrospect, Mr. Fried believes that the law clerk may inadvertently have been referring to Judge Duffy's order granting plaintiff's motion to appeal in forma pauperis and for transcription of the record, which was filed on November 3, 1978.

Mr. Fried was told by the clerk that both items were in the Closed File Room. Mr. Fried then went to the Closed File Room and requisitioned the docket sheet and case file. Looking through the entire contents of the case file, Mr. Fried found Judge Duffy's endorsement granting the motion for leave to appeal in forma pauperis and for transcription of the record and an unsigned judgment, but no signed judgment. The docket sheet, Mr. Fried was informed by the Closed File Room clerk, was missing and might be available at the Public Reference Room. Counsel returned to the Public Reference Room and explained the situation, including the possibility of a judgment being entered, to a clerk there. The clerk searched for but could not find the missing docket sheet or any other papers in the case. The clerk did, however, volunteer to take Mr. Fried's telephone number and call him after making a more thorough search for the docket sheet. This call was not forthcoming.

In reliance upon the earlier responses to his telephone inquires of Judge Duffy's chambers--especially the response to his November 3rd inquiry that the judgment had either been filed or would be filed on November 3, 1978, the absence from the file of a signed judgment and the fact that the docket sheet had been removed from the Closed File Room, Mr. Fried reasonably believed that the judgment had been filed and entered on November 3, 1978 at the earliest, and that therefore a notice of appeal would not have to be served or filed prior to January 2, 1979.[4/]

4. 28 U.S.C. §2102(b) allows sixty days to appeal from the judgment rendered herein.

In preparation for the filing of the notice of appeal, Mr. Fried again visited the Closed File Room on December 18, 1978 and requisitioned the case file and docket sheet. The case file still did not contain a signed judgment, but upon examining the docket sheet Mr. Fried learned for the first time that judgment in the case had been entered on October 2, 1978. No notice of the entry of judgment had been sent to either counsel, although required by Rule 77(d) of the Federal Rules of Civil Procedure.

Based upon these facts and upon the comprehensive briefs of the parties, in which defendants interposed the same objections that they raise here, the three-judge district court granted plaintiff's motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, vacated its judgment entered October 2, 1979, and re-entered it on January 12, 1979 to allow plaintiff to take a timely appeal therefrom. In moving to dismiss this appeal the appellees maintain that the district court is powerless under any circumstances to extend in this manner the time in which to take an appeal. They do not contest that if the district court has such power, it was properly exercised in this case.

ARGUMENT

UNDER COMPELLING CIRCUMSTANCES SUCH AS THOSE PRESENTED HERE, THE DISTRICT COURT HAS THE POWER TO VACATE AND RE-ENTER ITS JUDGMENT TO PERMIT A PARTY TO TAKE A TIMELY APPEAL THEREFROM

The decisions of this Court, as well as those of the six Circuit Courts of Appeals that have faced this issue, establish that in appropriate circumstances the District Court has the power to, and should, vacate and re-enter a judgment to allow a timely appeal to be taken therefrom.

Not one case, statute or court rule cited by the defendants in their motion to dismiss dictates otherwise.

In Hill v. Hawes, 320 U.S. 520, 88 L.Ed 283 (1944), this Court held that where a party had failed to timely appeal from a judgment entered by a district court because of the failure of the clerk of the court to notify the parties of the entry of judgment, as required by Rule 77(d) of the Federal Rules of Civil Procedure, vacatur and re-entry of the judgment by the district court does extend the time within which an appeal may be taken.[5] The essence of this holding, that if a party fails to timely appeal from a judgment of the district court due to excusable neglect that court can vacate and re-enter its judgment to allow a timely appeal, was not disturbed by the 1946 amendment to Rule 77(d)[6] as defendants maintain. This amendment merely relegated the failure of the clerk to send notice of the entry of judgment to the parties to one of the factors to be considered in determining whether to extend the time to appeal. It was no longer a dispositive factor as it had been in Hill v. Hawes, supra.

Federal Trade Commission v. Minneapolis Honeywell Regulator Co., 344 U.S. 306, 97 L.Ed. 245 (1952) is not the contrary. While the language of Federal Trade Commission v. Minneapolis Honeywell Regulator Co., quoted by appellees, seems at first blush to support the inflexible rule they propose, further research discloses that this Court has "consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict

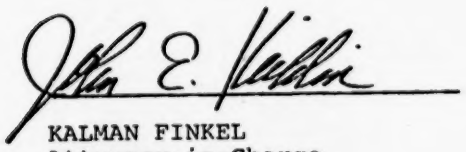
5. It should be noted that this decision was reached over the dissent of Chief Justice Stone, who took the position, urged by the defendants herein, that a district court is powerless to so extend the time to appeal from a judgment unless specifically permitted by statute or court rule.

6. See notes of Advisory Committee on Rules, 28 U.S.C.A., Fed. R. Civ. P., Rules 77 to End, p. 14

application of [its] rules." United States v. Ohio Power Co., 353 U.S. 98, 99, 1 L.E.2d 683, 685 (1955). Significantly, Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., supra, itself cites Hill v. Hawes, 320 U.S. 520, 88 L.Ed. 283 (1944), with approval. Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 212 n. 12,97 L.Ed. 245, 252 n. 12 (1952). Thus, while holding that the mere re-entry of a judgment, without more, will not extend the time during which an appeal may be taken therefrom, this Court preserved the rule of Hill v. Hawes. Where exceptional circumstances are present, a court may vacate and re-enter its judgment to begin anew the time within which to appeal therefrom and thereby prevent the occurrence of a substantial injustice. Every Court of Appeals to consider this question has so held. See Hayward v. Britt, 572 F.2d 1324 (9th Cir. 1978); Buckeye Cellulose Corp. v. Braggs Electric Constr. Co., 569 F.2d 1036 (8th Cir. 1978); International Control Corp. v. Vesco, 556 F.2d 665, 670-71 (2nd. Cir. 1977), cert. denied, 434 U.S. 956 (1978); Kramer v. American Postal Workers Union, AFL-CIO, 556 F.2d 919 (9th Cir. 1977); Braden v. University of Pittsburg, 552 F.2d 948 (3rd Cir. 1977) (en banc); Fidelity and Deposit Company of Maryland v. Usaform Hail Pool, Inc., 523 F.2d 744 (5th Cir. 1975), cert. denied, 425 U.S. 950 (1976); Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 500 F.2d 808 (D.C.Cir. 1974); Smith v. Jackson Tool & Dye, Inc., 426 F.2d 5 (5th Cir. 1970); Perrin v. Aluminum Company of America, 197 F.2d 254 (9th Cir. 1952).

Insofar as the district court, under the exceptional circumstances present herein, had the power to vacate and re-enter its judgment in order to begin anew the time within which an appeal could be lodged, the appellees' motion to dismiss this appeal should be denied.

Respectfully submitted,



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